



## **LIBRARY OF CONGRESS**

### **Copyright Royalty Board**

#### **37 CFR Part 385**

**[Docket No. 16-CRB-0003-PR (2018-2022)]**

### **Determination of Rates and Terms for Making and Distributing Phonorecords**

#### **(Phonorecords III)**

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Proposed rule.

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**SUMMARY:** The Copyright Royalty Judges publish for comment proposed regulations that set rates and terms applicable during the period beginning January 1, 2018, and ending December 31, 2022, for the section 115 statutory license for making and distributing phonorecords of nondramatic musical works.

**DATES:** Comments and objections, if any, are due no later than **[INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** The proposed rule is posted on the agency's website ([www.loc.gov/crb](http://www.loc.gov/crb)) and on the web at Regulations.gov ([www.regulations.gov](http://www.regulations.gov)). Interested parties should submit electronic comments via email to [crb@loc.gov](mailto:crb@loc.gov). Those who chose not to submit comments electronically should see How to Submit Comments in the Supplementary Information section below for physical addresses and further instructions.

**FOR FURTHER INFORMATION CONTACT:** Kimberly Whittle, Attorney Advisor, by telephone at (202) 707-7658, or by e-mail at [crb@loc.gov](mailto:crb@loc.gov).

## **SUPPLEMENTARY INFORMATION:**

### **Background**

Section 115 of the Copyright Act, title 17 of the United States Code, requires a copyright owner of a nondramatic musical work to grant a license (also known as the “mechanical” compulsory license) to any person who wants to make and distribute phonorecords of that work, provided that the copyright owner has allowed phonorecords of the work to be produced and distributed, and that the licensee complies with the statute and regulations. In addition to the production or distribution of physical phonorecords (compact discs, vinyl, cassette tapes, and the like), section 115 applies to digital transmissions of phonorecords, including permanent digital downloads and ringtones.

Chapter 8 of the Copyright Act requires the Copyright Royalty Judges (Judges) to conduct proceedings every five years to determine the rates and terms for the section 115 license. 17 U.S.C. 801(b)(1), 804(b)(4). Accordingly, the Judges commenced the current proceeding in January 2016, by publishing notice of the commencement and a request that interested parties submit petitions to participate. *See* 81 FR 255 (Jan. 5, 2016).

The Judges received petitions to participate in the current proceeding from Amazon Digital Services, Inc.; Apple, Inc.; American Society of Composers, Authors and Publishers (ASCAP); Broadcast Music, Inc. (BMI); Church Music Publishers Association; David Powell; Deezer S.A.; Digital Media Association (DiMA); Gear Publishing Co; GEO Music Group; Google, Inc.; Music Reports, Inc.; Nashville Songwriters Association International; National Music Publishers Association; Harry Fox Agency; Omnifone Group Limited; Pandora Media, Inc.; Recording Industry Association of America, Inc. (RIAA); Rhapsody International, Inc.; Songwriters of North America;

Sony Music Entertainment; SoundCloud Limited; Spotify USA Inc.; Universal Music Group (UMG); and Warner Music Group (WMG).

The Judges gave notice to all participants of the three-month negotiation period required by 17 U.S.C. 803(b)(3) and directed that, if the participants were unable to negotiate a settlement, they should submit Written Direct Statements no later than October 3, 2016. On June 15, 2016, the Judges received a motion stating that several participants<sup>1</sup> had reached a partial settlement “among a significant portion of the sound recording and music publishing industries” regarding the rates and terms under Section 115 of the Copyright Act for physical phonorecords, permanent digital downloads, and ringtones for 2018-2022 rate period and seeking approval of that partial settlement. *See Joint Motion to Adopt Partial Settlement*, Docket No. 16-CRB-0003-PR (2018-2022) at 1 (June 15, 2016) (Motion).

The settlement proposes “that the royalty rates and terms presently set forth in 37 C.F.R. Part 385 Subpart A should be continued for the rate period at issue in the Proceeding, with one minor conforming update, namely, that an outdated cross reference in section 385.4 regarding statements of account be updated, and that the continued rates should apply to “Subpart A Configurations made and distributed by or on behalf of UMG and WMG” and, in the Judges’ discretion, to other licensees. Motion at 3.

Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to adopt rates and terms negotiated by “some or all of the participants in a proceeding at any time during the proceeding” provided they are submitted to the Judges for approval. This

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<sup>1</sup> The participants filing the motion were Church Music Publishers Association, Nashville Songwriters Association International, National Music Publishers Association, Harry Fox Agency, and Songwriters of North America (collectively self-named the “Copyright Owners”), and licensees UMG and WMG.

section provides that Judges shall provide notice and an opportunity to comment on the agreement to (1) those that would be bound and (2) participants in the proceeding that would be bound by the terms, rates, or other determination set by the agreement. *See* section 801(b)(7)(A). The Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants not party to the agreement if any participant objects and the Judges conclude that the agreement does not provide a reasonable basis for setting statutory terms or rates. *Id.*

If the Judges adopt rates and terms reached pursuant to a negotiated settlement, those rates and terms are binding on all copyright owners of musical works and those using the musical works in the activities described in the proposed regulations.

### **Proposed Adjustments to Rates and Terms**

In publishing the parties' proposed rates and terms, the Judges are making the requested change in the cross reference because it is clearly outdated. The text of the section it refers to merely says "reserved." In addition, the Judges propose adding the dates of the five-year period to the "General" section in order to specify the applicable dates of the rates and terms.

In the event the Judges determine not to adopt the proposed regulations for all copyright owners of musical works licensed under section 115 for the making or distributing of physical or digital phonorecords, the parties have proposed the following revised definition of *licensee*<sup>2</sup>, which would make the rates in the partial settlement

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<sup>2</sup> The current definition is: "*Licensee* is a person or entity that has obtained a compulsory license under 17 U.S.C. 115, and the implementing regulations, to make and distribute phonorecords of a nondramatic musical work, including by means of a digital phonorecord delivery." 37 CFR 385.2.

applicable only to “Subpart A Configurations made and distributed by or on behalf of [licensees] UMG and WMG”:

Licensee is Capitol Christian Music Group, Inc., Capitol Records, LLC, UMG Recordings, Inc., Warner Music Inc., any of their respective successors, and any entity controlling, controlled by, or under common control with any such entity, when it has obtained a compulsory license under 17 U.S.C. 115, and the implementing regulations, to make and distribute phonorecords of a nondramatic musical work, including by means of a digital phonorecord delivery.

The Judges solicit comments on whether they should adopt the proposed regulations, including the change in the cross reference, as statutory rates and terms relating to the making and distribution of physical or digital phonorecords of nondramatic musical works for the participants that submitted the Motion. In addition, the Judges seek comment on whether they should apply the rates and terms in the partial settlement to all copyright owners and licensees and whether they should specify the five-year period in the regulation.

Comments and objections must be submitted no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

### **How to Submit Comments**

Interested members of the public must submit comments to only **one** of the following addresses. If not commenting by email or online, commenters must submit an original of their comments, five paper copies, and an electronic version in searchable PDF format on a CD.

**Email:** [crb@loc.gov](mailto:crb@loc.gov); or

**Online:** <http://www.regulations.gov>; or

**U.S. mail:** Copyright Royalty Board, PO Box 70977, Washington, DC 20024-0977; or

**Overnight service (only USPS Express Mail is acceptable):** Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

**Commercial courier:** Address package to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue SE, Washington, DC 20559-6000. Deliver to: Congressional Courier Acceptance Site, 2<sup>nd</sup> Street NE and D Street NE, Washington, DC; or

**Hand delivery:** Library of Congress, James Madison Memorial Building, LM-401, 101 Independence Avenue SE, Washington, DC 20559-6000.

### **List of Subjects in 37 CFR Part 385**

Copyright, Phonorecords, Recordings.

### **Proposed Regulations**

For the reasons set forth in the preamble, the Copyright Royalty Judges propose to amend 37 CFR part 385 as follows:

#### **PART 385—RATES AND TERMS FOR USE OF MUSICAL WORKS UNDER COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS**

1. The authority citation for part 385 continues to read as follows:

**Authority:** 17 U.S.C. 115, 801(b)(1), 804(b)(4).

§385.1 [Amended]

2. Section 385.1(a) is amended by adding “, during the period January 1, 2018, through December 31, 2022” after “17 U.S.C. 115”.

§ 385.4 [Amended]

3. Section 385.4 is amended by removing “§ 201.19(e)(7)(i)” and adding “§ 210.16(g)(1)” in its place.

Dated: July 19, 2016.

**Suzanne M. Barnett,**

*Chief Copyright Royalty Judge.*

**BILLING CODE 1410-72-P**

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